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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

R.S., *individually and on behalf of all
others similarly situated,*

Plaintiff,

v.

PRIME HEALTHCARE SERVICES,
INC.,

Defendant.

Case No. 5:24-cv-00330-ODW-SP

**PLAINTIFF'S NOTICE AND
MOTION FOR
RECONSIDERATION OF
ORDER ON MOTION TO
DISMISS [24]**

Date: September 23, 2024

Time: 1:30 p.m.

Judge: Judge Otis D. Wright, II

1 **TO THE HONORABLE COURT AND TO DEFENDANT AND**
2 **COUNSEL OF RECORD:**

3 **NOTICE IS HEREBY GIVEN** that on September 23, 2024 at 1:30
4 p.m., in Courtroom 5D of the above-entitled Court located at First Street
5 Courthouse, 350 W. 1st Street in Los Angeles, CA. 90012, 5th Floor, Plaintiff
6 R.S. will and hereby does move this Honorable Court to reconsider its Order
7 Granting Defendant's Motion to Dismiss, ECF No. 24, on the grounds that
8 the Court committed clear error in dismissing with prejudice Plaintiff's only
9 cause of action.

10 This Motion is based upon this Notice, the accompanying
11 Memorandum of Points and Authorities, all pleadings, papers and records on
12 file in this Action and such other oral argument and documentary evidence as
13 may be presented at or before the time of adjudication of this Motion.

14 This Motion is made following the conference of counsel pursuant to
15 Local Rule 7-3, which took place on August 19, 2024.

16
17 **DATED:** August 21, 2024

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1 Plaintiff R.S. respectfully moves the Court, pursuant to Federal Rule of
2 Civil Procedure 59(e) and Local Rule 7-18, to reconsider its August 7, 2024
3 Order (the “Order”) granting Defendant’s Motion to Dismiss Plaintiff’s
4 Complaint for violation of the Electronic Communications Privacy Act, 18
5 U.S.C. 2111(1), *et seq.* (“ECPA”) without leave to amend. *See* ECF No. 24.

6 **I. PRELIMINARY STATEMENT**

7 This Motion raises one discrete issue: whether the Court committed
8 clear error when it did not consider and specifically address Plaintiff’s
9 argument that the ECPA’s exception from liability for those that are a party
10 to the communication does not apply where the “communication is
11 intercepted for the purpose of committing any criminal or tortious act in
12 violation of the Constitution or laws of the United States or of any State.” 18
13 U.S.C. § 2511(2)(d). In its Order, the Court stated that Plaintiff failed to
14 respond to Defendant’s assertion that it cannot unlawfully intercept a
15 communication to which it is a party. But, as argued in the Opposition to the
16 Motion to Dismiss, Plaintiff acknowledged that Defendant was a party to the
17 communication but argued that because Defendant’s purpose was to invade
18 Plaintiff’s privacy and to violate the Health Insurance Portability and
19 Accountability Act of 1996 (“HIPAA”), the crime-tort exception to the party
20 exemption applied. *See* Opposition to Motion to Dismiss (“Opposition or
21 “Opp.”), ECF No. 16 at 6. Accordingly, Plaintiff respectfully requests that
22 this Honorable Court reconsider its analysis of Plaintiff’s ECPA claim to
23 include the application of the crime-tort exception to the party exemption.

24 **II. PROCEDURAL HISTORY AND THIS COURT’S DECISION**

25 Plaintiff filed her Complaint on February 8, 2024, alleging a single
26 cause of action against Defendant Prime Healthcare Services, Inc.’s (“Prime
27 Healthcare”) for violations of the ECPA. ECF No. 1 (“Complaint”). On April
28

1 24, 2024, Defendant filed its Notice of Motion and Motion to Dismiss
2 Plaintiff's Complaint Pursuant to Federal Rule of Civil Procedure 12(b)(6).
3 ECF No. 14 ("Motion to Dismiss"). On May 20, 2024, Plaintiff filed her
4 Opposition to the Motion to Dismiss. ECF No. 16. Plaintiff's Opposition
5 requested leave to amend "to address any pleading deficiencies." *Id.* at 21
6 (citing *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009)).
7 On May 24, 2024, Defendant filed its reply. ECF 17.

8 On August 7, 2024, the Court granted Defendant's Motion to Dismiss
9 without oral argument. ECF 24. The Court's Order dismissed Plaintiff's claim
10 with prejudice. *Id.* at 5. In doing so, the Court first concluded that because
11 Plaintiff did "not respond to Prime Healthcare's argument that it cannot
12 unlawfully intercept a communication to which it is a party. . . Plaintiff
13 concedes this argument." *Id.* at 4. The Court then held that "even if the Court
14 were to consider the merits of Defendant's argument," because Prime
15 Healthcare installed the tracking technologies, it "necessarily consented to the
16 use of those pixels and the 'interception' of the communications between R.S.
17 and Prime Healthcare." *Id.* at 4-5. Ultimately, the Court concluded, without
18 examining the crime-tort exception to the party exemption, that because
19 Prime Healthcare was a party to the communications at issue, it could not be
20 held liable for the interception. *See id.* at 4-5. The Court also found that
21 because "the allegation of other facts consistent with the challenged pleading
22 could not possibly cure the deficiency, the dismissal is without leave to
23 amend." *Id.* at 5 (citation omitted).

24 **III. LEGAL STANDARD**

25 Pursuant to Federal Rule of Civil Procedure 59(e), "a party may move
26 to alter or amend a judgment." *Curtis v. Irwin Indus., Inc.*, 2016 WL 4975188,
27 at *2 (C.D. Cal. Sept. 16, 2016). A motion for reconsideration should be

1 granted where the district court “is presented with newly discovered evidence,
2 *committed clear error*, or if there is an intervening change in the controlling
3 law.” *Kona Enter., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)
4 (emphasis added & internal quotes omitted). Local Rule 7-18 provides that
5 “[a] motion for reconsideration of an Order on any motion or application may
6 be made only on the grounds of (a) a material difference in fact or law from
7 that presented to the Court that, in the exercise of reasonable diligence, could
8 not have been known to the party moving for reconsideration at the time the
9 Order was entered, or (b) the emergence of new material facts or a change of
10 law occurring after the Order was entered, or (c) a manifest showing of a
11 *failure to consider material facts* presented to the Court before the Order was
12 entered.” L.R. 7-18 (emphasis added).

13 **IV. ARGUMENT**

14 Reconsideration is appropriate because the Court committed clear error
15 in failing to address Plaintiff’s argument in her Opposition—supported by
16 citation to material facts and allegations in the Complaint—regarding the
17 applicability of the criminal or tortious exception to the party exemption to
18 Plaintiff’s ECPA claim. Although “[n]o motion for reconsideration may in
19 any manner repeat any oral or written argument made in support of, or in
20 opposition to, the original motion,” this Motion identifies “a failure to
21 consider material facts presented to the Court before the Order was entered.”
22 L.R. 7-18. Where a court relies on a misunderstanding of Plaintiff’s
23 allegations or arguments, reconsideration may be granted. *See, e.g., Wide*
24 *Voice LLC v. CenturyLink Commc’ns, LLC*, 2022 WL 1394747, at *2 (C.D.
25 Cal. Jan. 24, 2022) (granting motion to reconsider, in part, where the court’s
26 order did not address one of plaintiff’s arguments specifically); *Garcia v.*
27 *Capistrano Unified Sch. Dist.*, 2018 WL 5858708, at *3 (C.D. Cal. May 1,

2018) (granting motion for reconsideration because “the Court manifestly failed to consider” specific allegations).

This Court has previously recognized that where it does not analyze a portion of an argument before it, reconsideration may be appropriate. *See, e.g., Curtis*, 2016 WL 4975188, at *4 (“Because the Court dismissed the complaint as pre-empted by § 301, and not for failure to make use of the grievance procedure established in the CBAs, the Court never analyzed the CBAs’ arbitration provision, and improperly ordered the parties to arbitration.”); *Miller v. Midland Funding LLC*, 2008 WL 5003042, at *1 (C.D. Cal. Nov. 20, 2008) (granting motion to reconsider after re-evaluating evidence before the Court). Other courts in this district have previously stated that motions for reconsideration are appropriate if “the Court committed clear error or the initial decision was manifestly unjust.” *Cox v. LB Lending, LLC*, 2018 WL 4761614, at *5 (C.D. Cal. May 23, 2018).

Here, the Court concluded that Prime Healthcare avoided judicial scrutiny because “the ECPA contain[s] an exemption from liability for a person who is a ‘party’ to the communication, whether acting under the color of law or not.” Order at 4 (internal quotation omitted). The Court’s Order maintained that Plaintiff failed to respond to Defendant’s argument that it cannot unlawfully intercept a communication to which it is a party. *See id.* While Plaintiff agreed that Defendant was a party to the intercepted communication and that, without more, the one-party exemption would apply, Plaintiff’s argument and analysis did not end there. *See Opp.* at 6-7, 11, 13 & 18; *see also* Compl. ¶ 240. Rather, the second part of Plaintiff’s argument was that the party exemption in § 2511(2)(d) does not permit a party that intercepts or causes interception to escape liability if the “communication is intercepted for the purpose of committing any tortious or criminal act in violation of the

1 Constitution or laws of the United States or of any State.” Opp. at 9-10. When
2 the Court concluded its analysis with the party exemption to liability, the
3 Court disregarded the second part of Plaintiff’s analysis—the application of
4 the crime-tort exception—and did not consider Plaintiff’s argument on that
5 ground. Far from conceding the entirety of her argument, Plaintiff established
6 that Defendant, despite being a party to her communications, unlawfully
7 intercepted them because Prime Healthcare’s purpose was to tortiously and
8 criminally invade her privacy and to violate HIPAA. *See id.*; *see also* Compl.
9 ¶¶ 27, 243 & 239-250.

10 Importantly, Defendant itself admits, “it can still be held liable under
11 the ECPA if Prime Healthcare acted for the purpose of committing any crime
12 or tort in violation of state or federal law.” MTD at 8 (cleaned up). Indeed,
13 Defendant spent six pages addressing why, in its opinion, the crime-tort
14 exception did not apply. *See id.* at 8-13. As Defendant and Plaintiff both
15 recognize, if the Court concludes that Defendant intercepted Plaintiff’s
16 communications for a criminal or tortuous purpose, such as criminally
17 violating HIPAA and tortiously invading Plaintiff’s privacy, then Defendant
18 cannot escape judicial scrutiny pursuant to the party exemption. Plaintiff
19 maintains that Prime Healthcare intercepted her electronic communications
20 for the purpose of disclosing her PHI and PII without consent thereby
21 tortiously and criminally invading her privacy and violating HIPAA. *See* Opp.
22 at 11-13 & 17-20; *see also* Compl. ¶¶ 27 & 239-250.

23 The Order cites three cases for the proposition that courts “agree that a
24 hospital is a party to the communication where it uses a pixel to track activity
25 on its website.” Order at 4-5. But each of the cases is inapposite and the court
26 in each ultimately granted leave to amend. First, in *B.K. v. Eisenhower*
27 *Medical Center*, the court granted plaintiffs’ motion for reconsideration to its

1 initial order dismissing their ECPA claim, holding that amendment would not
2 be futile and that additional allegations could support a finding that the crime-
3 tort exception applies. *See* 2024 WL 2037404, at *4 (C.D. Cal. Apr. 11, 2024).
4 Plaintiffs subsequently filed an amended complaint. *See* 5:23-cv-02092, ECF
5 No. 37. Next, in *Williams v. Dukehealth*, the court did not address the
6 applicability of the crime-tort exception to the ECPA claim and dismissed the
7 claim without prejudice. *See* 2024 WL 898051, at *8 (M.D.N.C. Mar. 1,
8 2024). Finally, *Okash v. Essentia Health* is an outlier in Minnesota, relied on
9 an outdated analysis in *Kurowski v. Rush System for Health*, and permitted
10 plaintiff leave to amend. *See* 2024 WL 1285779, at *5 (D. Minn. Mar. 26,
11 2024) (granting leave to amend “to allow Okash to plead an independent
12 connection to a tortious act, should one exist.”). Pre- and post-dating *Okash*,
13 the *Kurowski* court held that plaintiff’s amended complaint was “sufficient to
14 invoke the HIPAA exception-to-the-party-exception” and denied a motion for
15 judgment on the pleadings on the same issue. *See* 2023 WL 8544084, at *3
16 (N.D. Ill. Dec. 11, 2023) (granting leave to amend) & 2024 WL 3455020, at
17 *6 (holding that defendant is not entitled to judgment as a matter of law).

18 In contrast, courts nationwide and in this district have denied motions
19 to dismiss ECPA claims and held that healthcare providers were parties to
20 pixel-related communications because the crime-tort exception applied. *See*
21 Opp. at 16 & 20-21 (listing cases that denied motions to dismiss ECPA claims
22 after applying the crime-tort exception). Since Plaintiff filed her Opposition,
23 courts have continued to deny motions to dismiss ECPA claims in similar
24 cases against healthcare defendants that used tracking pixels to intercept and
25 disclose personal information. *See, e.g., Cooper v. Mount Sinai Health Sys.,*
26 *Inc.*, 2024 WL 3586357, at *9 (S.D.N.Y. July 30, 2024) (denying motion to
27 dismiss ECPA claim where crime-tort exception applied); *In re BetterHelp*,

1 *Inc. Data Disclosure Cases*, 2024 WL 3416511, at *4 (N.D. Cal. July 15,
2 2024) (finding crime-tort exception to applied because defendant disclosed
3 “its customer’s sensitive mental health-related information in violation of
4 HIPAA.”); *Smith v. Loyola Univ. Med. Ctr.*, 2024 WL 3338941, at *7 (N.D.
5 Ill. July 9, 2024) (same). Thus, because the crime-tort exception applies, the
6 fact that Prime Healthcare was a party to the communications does not shield
7 it from liability, and the Court should have considered this material argument
8 in its Order. *See, e.g., Curtis*, 2016 WL 4975188, at *4; *Miller*, 2008 WL
9 5003042, at *1.

10 While Plaintiff maintains that she has stated a plausible claim for relief
11 under the ECPA due to the crime-tort exception, Plaintiffs requests alternative
12 relief in the form of leave to amend her Complaint. Under Federal Rule of
13 Civil Procedure 15(a) and Supreme Court precedent, “leave to amend shall be
14 freely given when justice so requires; this mandate is to be heeded.” *Foman*
15 *v. Davis*, 371 U.S. 178, 182 (1962 (cleaned up)). Requests for leave to amend
16 should be granted with “extreme liberality.” *Brown v. Stored Value Cards,*
17 *Inc.*, 953 F.3d 567, 574 (9th Cir. 2020) (citations & quotations omitted). Here,
18 Plaintiff requested leave to amend if the Court determined that her ECPA
19 claim was inadequately pleaded. *See Opp.* at 18. Although Plaintiff has not
20 filed an amended complaint, the Court found that Plaintiff “could not possibly
21 cure the deficiency.” *See Order* at 5. However, if afforded the opportunity to
22 amend, Plaintiff can and will more clearly allege the inapplicability of the
23 party exemption and that the purpose of Defendant’s interception was
24 criminal and/or tortious. *See, e.g., Williams-Blair v. Brennan*, 2021 WL
25 3660756, at *1 (C.D. Cal. June 2, 2021) (granting motion for reconsideration
26 to allow leave to amend); *Postman v. Spin Master, Ltd.*, 2015 WL 12747905,
27 at *5 (C.D. Cal. Nov. 30, 2015) (similar); *Monaco v. Bear Stearns*

1 *Companies, Inc.*, 2011 WL 11027559, at *6 (C.D. Cal. Jan. 13, 2011)
2 (similar); *Lincoln v. Cal-W. Reconveyance Corp.*, 2009 WL 10674759, at *3
3 (C.D. Cal. July 13, 2009) (granting motion for reconsideration in part and
4 allowing plaintiff leave to amend); *Valentine v. First Advantage Saferent,*
5 *Inc.*, 2008 WL 4367353, at *2 (C.D. Cal. Sept. 23, 2008) (mooting motion to
6 reconsider after granting leave to amend).¹

7 **V. CONCLUSION**

8 For the reasons set forth above, Plaintiff respectfully requests that the
9 Court reconsider and amend its Order granting dismissal of Plaintiff's claim
10 for violation of the ECPA without leave to amend.

11
12 **DATED:** August 21, 2024

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24 _____
25 ¹ The remaining *Foman* factors are also in Plaintiff's favor. There has been no
26 undue delay in bringing this Motion—as this Motion is brought within
27 fourteen days of the Court's order on Defendant's Motion to Dismiss, Plaintiff
28 does not bring this Motion in bad faith and there is no undue prejudice to
Defendant.

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